FILED
JAN 13 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

JANUARY TERM, 1966

No. 1015

PELLEGRINO MILLO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD G. BURSTEIN
JEROME GOLDMAN
177 State Street
Bridgeport, Connecticut
Counsel for Petitioner

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	15

TABLE OF AUTHORITIES CITED.

Cases:

Acklen v. State of Tennessee, 267, S.W. 2d 101 (Tenn. 1954)	10
Alvertson v. Subversive Activities Control Board ....U.S..... (1965)	4, 5, 8, 9
Brunner v. United States, 343 U.S. 918	8
Hoffman v. United States, 341 U.S. 479 (1951)	7
Irving Blau v. United States, 340 U.S. 332	8
Lewis v. United States, 348 U.S. 419 (1955)	2, 4, 5, 6, 7, 8, 11
Malloy v. Hogan, 378 U.S. 1 (1964)	7, 11
Marshall v. United States, 360 U.S. 310. (1959)	14
Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964)	11
Patricia Blau v. United States, 340 U.S. 159	8
Quinn v. United States	8
Snowden v. Hughes, 321 U.S. 1 (1944)	12
State v. Devine, 149 Conn. 640, 183 A.2d 612 (1962)	10
State v. Nunes, 205 A.2d 24 (R. I. 1964)	15

PAGE

State v. McLaughlin, 132 Conn. 325, 44 A.2d 116 (1945) 10

Townsen v. Burke, 334 U.S. 736, 741 13

United States v. Calamaro, 354, U.S. 351 (1957) 11, 12, 13

United States v. Costello, et al., 2 Cir. October 29, 1965, Slip Sheets 3319 at 3322-3323 and Fn. 1 ..... 4, 5

United States v. Grassia, 2 Cir. November 26, 1965 ..... 4, 5

United States v. Kahriger, 345 U.S. 22 (1953) ..2, 4, 5, 7, 8, 11, 12

United States v. Marzano, 149 F.2d 923 (2 Cir. 1945) 14

United States v. Mungioli, 233 F.2d 204 (3 Cir. 1956) 9

United States v. Rabinowich, 238 U.S. 78 (1915) 10

Yick Wo v. Hopkins, 118 U.S. 356, 373-4 (1886) 12

United States Constitution:

Fifth Amendment 2

Sixth Amendment 2

Tenth Amendment 2

Statutes:

26 U.S.C. Sec. 4401 2

26 U.S.C. Sec. 4411 ..... 2, 9

26 U.S.C. Sec. 4412 ..... 2, 9

26 U.S.C. Sec. 6011(a) 9

28 U.S.C. Sec. 1254 (1) 2

26 C.R.F. Sec. 44.4412-1 (b) (2) 10

Connecticut General Statutes (1958 Rev.):

Sections 53-271 to 53-279 9

Sections 53-295 to 53-297 9

IN THE

Supreme Court of the United States

JANUARY TERM, 1966

No. .....

PELLEGRINO MILLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Pellegrino Millo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 15, 1965.

OPINION BELOW.

The opinion of the Court of Appeals, as yet un-

reported, is printed in the Appendix to this petition (App. 1a)[1]

JURISDICTION.

The judgment of the Court of Appeals was entered on December 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Should **United States v. Kahriger,** 345 U. S. 22 (1953) and **Lewis v. United States,** 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved be reconsidered by this Court in the light of recent decisions?

2. Assuming, **arguendo,** the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

---

[1]References are indicated as follows:
References to the numbered pages of the Appendix to Petition for Petitioner, Pellegrino Millo (App. a)
References to the numbered pages of the Appendix to Brief for Appellant, Pellegrino Millo in the Court of Appeals (App. Ct. App. a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioner maintains that the judgment of the court below, affirming his conviction for violations of the wagering tax laws, violates his rights under the Fifth, Sixth and Tenth Amendments of the United States Constitution. The wagering tax laws, 26 U.S.C. Secs. 4401, 4411 and 4412, and the constitutional provisions involved, together with general revenue laws relating to these cases, are set forth in the Appendix to this petition (App. 5a)

STATEMENT.

Petitioner faces a one-year prison sentence and a $10,000.00 fine for convictions by a jury presided over by Chief Judge Timbers of the United States District Court for the District of Connecticut upon an indictment charging willful violations of the wagering tax statutes (App. 1a). His conviction stems from a raid on October 8, 1964, in Bridgeport, Connecticut, in which he and 36 other defendants were arrested on similar charges (App. 1a).

The indictment against Petitioner and the others was returned under seal by a grand jury of the District of Connecticut on October 6, 1964, two days before the raid and arrests (App. Ct. App. 1a);

On January 9, 1965, in accordance with Chief Judge Timbers' order conditioning bail upon the filing of a notice of appeal within 24 hours, petitioner appealed to the Court of Appeals for the Second

Circuit (App. Ct. App. 4a), which affirmed the judgments (App. 5a).

Relying on **United States v. Kahriger,** 345 U.S. 22 (1953), and **Lewis v. United States,** 348 U.S. 419 (1955), the Court of Appeals rejected petitioner's constitutional attack upon the wagering tax statutes and the manner of their application here.

"Likewise, we hold that the statute, amended after **United States v. Kahriger,** 345 U.S. 22 (1953), was not beclouded thereby," **U. S. v. Costello, et al.,** 2 Cir. October 29, 1965, slip sheets 3319 at 3322-3323 and fn. 1 (App. 4a)

"Lastly, we also held in **U. S. v. Costello,** supra, at slip sheets 3324-3325, that as the payment of the tax and disclosure of the occupation is only required of one who of his own volition intends to follow the occupation, the requirements of the statutes do not violate the protection afforded by the Fifth Amendment because one is not compelled to incriminate himself. In so holding we relied upon **Lewis v. United States,** 348 U.S. 419 (1955). If by any chance **Albertson v. Subversive Activities Control Board,** ....U.S....., 34 U.S.L. Week 4014, November 15, 1965, decided after the present case was briefed and argued and after our decision in **U. S. v. Costello, supra,** was handed down, has affected **Lewis,** we continue to be bound by the **Lewis** holding. See **United States v. Grassia,** 2 Cir. November 26, 1965." (App. 4a)

In the cases of **James Marchetti v. United States of America,** Docket No. 29524, and **Frank Costello**

v. United States of America, Docket No. 29525, which were heard by the Circuit Court of Appeals, Second Circuit, and in which the Judgment of the District Court which was decided on October 29, 1965, the Court of Appeals stated:

> "We find no subsequent opinion (to **Kahriger** and **Lewis**) reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow."

On reargument, the Court noted by reference to the related case of **United States v. Grassia:**

> "Recognizing that the rationale of **Albertson v. Subversive Activities Control Board** .... U.S. .... (1965), announced subsequent to our **Costello** opinion, may lead the Supreme Court to overrule its previous decisions in **United States v. Kahriger,** 345 U.S. 22 (1953), and **Lewis v. United States,** 348 U.S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination."

REASONS FOR GRANTING THE WRIT.

This petition presents significant and fundamental issues relating to the wagering tax statutes and their application in the District of Connecticut. Review of the questions presented is called for (1) because this Court's decisions in **United States v. Kahriger,**

345 U.S. 22 (1953), and **Lewis v. United States,** 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court; and (2) because the Court below has sanctioned statements by the district judge which sufficiently depart from the proper administration of federal criminal justice to call for an exercise of this Court's power of supervision.

I.

> "Are you engaged in the business of accepting wagers on your own account?"
>
> "Do you receive wagers for or on behalf of some other person or persons?" (App. 9a)

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (App. 9a) that petitioner has been subjected to a one year prison sentence and a $10,000.00 fine (App. 3a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

> ". . . would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." **Lewis v. United States, supra,** 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner, in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate,"

Malloy v. Hogan, 378 U.S. 1, 12 (1964), the court below relied squarely upon **Kahriger** and **Lewis.** In the cases of **United States of America v. Frank Costello, James "Totto" Marchettti and Arthur, Gjanci,** Docket No. 29524; **United States of America v. Frank Costello,** Docket No. 29525; **United States of America v. James "Totto" Marchetti,** Docket No. 29526; and **United States of America v. Arthur Gjanci,** Docket No. 29527, while noting, by reference, in its opinion on rehearing that **Albertson v. Subversive Activities Control Board, supra,** may lead this Court to overrule **Kahriger** and **Lewis** "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the Court felt that the issue was appropriate only for this Court's determination.

What petitioner urges is a reappraisal of **Kahriger** and **Lewis** in the light of **Malloy** and **Albertson.**

Significantly, **Kahriger** and **Lewis** were decided without mention of the doctrine this Court firmly established in **Hoffman v. United States,** 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction. . . ., but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute. . .," and without reference to the specific information sought by the Internal Revenue Service form involved here (App. 9a). **Malloy** reemphasized the link-in-the chain principle ignored in **Kahriger** and **Lewis; Albertson** emphasized the questions on the Justice Department registration form, the I. R. S. counter-

part of which is involved here and had been ignored in **Kahriger** and **Lewis.**

In **Kahriger** and **Lewis,** the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at 32, 33, 348 U.S. at 422. But by similar reasoning the **Albertson** registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a Sec. 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in **Albertson;** and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of **Kahriger** and **Lewis:**

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act. . . or under Section 4(a) of the Subversive Activities Control Act. . ., to mention only two Federal criminal statutes . . . **Patricia Blau v. United States,** 340 U.S. 159; **Irving Blau v. United States,** 340 U.S. 332; **Brunner v. United States,** 343 U.S. 918; (and) **Quinn v. United States,** 349 U.S. 195 . . . involved questions to witnesses on the witness stand, but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes . . . It follows

that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." **Albertson v. S.A.C.B., supra,** 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. Sec. 4411 (App. 6a), thereby admitting that he was engaged in wagering, he would also be required, by 26 U.S.C. Secs. 4412 (App. 6a) and 6011 (App. 8a), to furnish on I.R.S Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers (App 8a).[2]

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, Sections 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958

---

[2]These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is **both** a special tax return and application for registry, which petitioner would have had to complete in order to pay the special tax prescribed by Sec. 4411 and avoid conviction. By virtue of 26 U.S.C. Sec. 6011 (a):

> " . . . Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the $50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the $50 special tax. **United States v. Mungioli,** 233 F.2d 204, 205 (3 Cir. 1956).

Rev.)[3] would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations, 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering.[4] And disclosure of the place of business in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the wagering or conspiracy. **State v. McLaughlin,** 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, **State v. Devine,** 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. **United States v. Rabinowich,** 238 U.S. 78, 86 (1915).

---

[3] In **Acklen v. State of Tennessee,** 267 S.W. 2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

[4] 26 C.F.R. Sec. 44.4412-1 (b) (2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers **within 10 days after that** "employee" is so engaged. The "employer" then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the ten day delay permitted in the registration of such "employees" the information supplied would relate not only to future criminal acts, but also to **past** criminal acts.

If response to the questions asked in **Malloy**, 378 U.S. at 13-14, involved the **possibility** of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical **certainty.**

To leave **Kahriger** and **Lewis** standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." **Murphy v. Waterfront Commission of New York,** 378 U.S. 52, 55 (1964).

II.

Not only do the wagering tax statutes here involved violate the Fifth Amendment, but the manner of their application violates the Tenth Amendment, and, at the very least, the proper standards for the enforcement of federal criminal law.

Since **Kahriger** — which rejected Mr. Justice Frankfurter's view that the revenue aspect of the wagering tax statutes constituted merely "verbal cellophane" allowing Congress to "control conduct which the Constitution left to the responsibility of the states," 345 U.S. at 38 — this Court has made it clear that no weight can be given to the premise that the enactment of the statutes was "in part motivated by a congressional desire to end wagering." **United States v. Calamaro,** 354 U.S. 351, 358 (1957). Consideration of such collateral motives, this Court added in **Calamaro,** "might place the constitutional-

ity of the statute in doubt." 354 U.S. at 358. Significantly, in affirming over Tenth Amendment objections, the court below ignored **Calamaro** (App. 1a-5a)

In **Kahriger,** the Court considered only the bare words and history of the statutes themselves. In the case at bar, the manner of application and enforcement of the statutes — both by the Government and the district court —[5] clearly demonstrates that the "constitutionality . . . doubt" feared in **Calamaro** has materialized.

The Appellant was convicted of violating a federal tax law and not a state gambling law. It is apparent, however, that the Court viewed the statute as a means of assault by the Federal Government upon gambling crimes covered by state law rather than as a revenue raising measure. On January 1, 1965 the following remark was made by the Court prior to imposition of sentence upon the Appellant.

> "'While it is true that these are tax cases, prosecution authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that **it is the clear intent of Congress, in authorizing such prosecu-**

---

[5]It is fundamental that the application and enforcement of a federal statute — constitutionally sound on its face — may result in a constitutional denial. **Yick Wo v. Hopkins,** 118 U.S. 356, 373-4 (1886); **Snowden v. Hughes,** 321 U.S. 1 (1944)

tions, to deal with a vice, namely that of gambling."[6]

These remarks of the trial court are not in accord with the opinion expressed by the United States Supreme Court.

> "The statute was passed and its constitutionality was upheld, as a revenue measure, and apart from all else in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt."
>
> **U. S. v. Calamaro,**
> 354 U.S. 351, 358

The use of improper, misplaced and incorrect criteria as a basis for sentence was a clear violation of the Appellant's rights.

> **Townsend v. Burke,**
> 334 U.S. 736, 741

Even if the combined conduct of Government and court is not interpreted as a Tenth Amendment encroachment, a reversal is called for on the basis of this Court's exercise of its "supervisory power to formulate and apply proper standards for the en-

---

[6]Transcript of proceedings held on Jan. 11, 1965 in connection with imposition of sentence upon Frank Costello, Arthur Gjanci, James Marchetti, Carl Piccioli, and related cases. Circuit Court Docket Nos. 29524 and 29526 Defendant-Appellant's joint Appendix Pg. 344(a).

forcement of the criminal law." **Marshall v. United States,** 360 U.S. 310, 313 (1959).

On March 8, 1965, the Court imposed sentence against the Appellant and several other defendants, each of whom was convicted of violating federal gambling tax laws. Appellant submits that he was denied due process of law, in that improper and mistaken criteria were used by the Court as a basis for imposing sentence. (App. Ct. App. 18a) (See Remarks of Honorable William H. Timbers, February 8, 1965).

The Connecticut Chief Judge's public urgings to "eradicate this . . . cancer of organized gambling . . . now" (App. Ct. App. 20) and other statements expressed in his remarks, indicate, as Judge Learned Hand once wrote, that the:

> " . . judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials." **United States v. Marzano,** 149 F.2d 923, 926 (2 Cir. 1945).

That the statements were post-trial certainly does not eliminate the need for exercise of this Court's supervisory power. As the Supreme Court of Rhode Island said in a similar situation:

> "The import of these remarks . . . made immediately after the conclusion of the trial with a verdict of guilty discloses a prejudical state of mind on the part of the judge that reasonably must be considered to have existed during the

trial." **State v. Nunes**, 205 A.2d 24, 27 (R. I. 1964).

CONCLUSION.

For these reasons, then, this Court should — and petitioner requests that it does — issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

EDWARD G. BURSTEIN
JEROME GOLDMAN
177 State Street
Bridgeport, Connecticut
Counsel for Petitioner.

January 7, 1966.